

1 COURT OFFICER: This is Index Number 15842
2 of 2010. Joralemon Realty versus Tri-State of New
3 York.

4 MR. FISHER: For the petitioner. Kenneth
5 K. Fisher, from the law firm of Cozen O'Connor. With
6 me are two of my colleagues: Jennifer F. Beltrami
7 and Paul Proulx.

8 MR. DOBKIN: For the respondent, Riverside
9 Apartments Tenants Association, of the law firm of
10 Collins, Dobkin and Miller, LLP, by Steven Dobkin,
11 277 Broadway, New York, New York. And I have John
12 Lilienthal with me, who is familiar with this case,
13 who has handled it before.

14 MS. DOTI: Maria I. Doti, for the New York
15 State Division of Housing and Community Renewal. We
16 are the respondent and the one who issued the
17 determination that's under review under the CPL
18 Article 78 proceeding.

19 THE COURT: We are at the site of the
20 property. What is the correct address? We are at
21 Columbia and Joralemon Streets.

22 MR. FISHER: At the property known as
23 Riverside Apartments Tenants Association.

24 THE COURT: We were in the courtyard.
25 We've had a conversation.

1 The Court looked at the courtyard that's
2 the subject of the hearing. The Court believed that
3 coming to the site of the property, looking at it
4 with the naked eye, would give the Court a clearer
5 insight, in addition to the verbal motions and oral
6 arguments made before the Court.

7 Do you want to repeat what you've said to
8 the Court?

9 MR. FISHER: (Indicating.)

10 THE COURT: The Court saw that in the
11 middle of the courtyard there are trees that seem to
12 have been there for quite a number of years. There
13 is no asphalt in the middle of the courtyard. In
14 fact, there seems to be what appears to be a little
15 play area, a little play area, with water, for
16 children and adults, and two sitting benches, and
17 then the rest is asphalt. So, that is what the Court
18 saw with its naked eye.

19 Mr. Fisher, put on the record what you were
20 saying. And everyone will have the opportunity to
21 proceed with whatever they wish to place on the
22 record.

23 MR. FISHER: The position that the
24 petitioner is taking in its papers is that the
25 proposed plan which would remove virtually all of the

1 asphalt and turn that into green space, and would
2 include the planting of numerous new trees so that
3 there would be more trees afterward than there are
4 today, and which also includes using the public
5 access easement as a pathway to the entrance of a
6 completely underground garage, constitutes a
7 restoration of the courtyard surface, which was the
8 basis of the initial order in 1991. Basically, what
9 the -- this is all set forth in our papers in detail.

10 Basically, in 1991, DHCR found the paving
11 over of a substantial part of the courtyard, by the
12 prior owner, and using that as a parking area
13 deprived the tenants of the use of the courtyard. We
14 believe that notwithstanding the underground garage,
15 that the plan that we have submitted to the DHCR
16 constitutes restoration of that courtyard. As we've
17 noted in our papers, while the jurisdiction of the
18 Landmarks Commission is different than the DHCR's,
19 that the Court should give heavy weight to the fact
20 that the Landmarks Commission not only found that the
21 plan was appropriate for this district, but made a
22 specific finding that the new garden plan that Mr.
23 Weintraub developed constituted what they call
24 complete restoration of the use of the courtyard as
25 it was originally intended before the Brooklyn-Queens

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1 Expressway was built.

2 THE COURT: I don't know how they can find
3 that. Because once you put that garage in and cars
4 are coming in and out to be parked--and you must have
5 people to park the cars--everyday, doesn't that
6 deprive the tenants of the use of the courtyard?

7 MR. FISHER: Not as found by the DHCR.
8 There was a --

9 THE COURT: Maybe they should come in.

10 MR. FISHER: There was a site visit.

11 And in addition to that, your Honor, I
12 think, your Honor, we were, during the site visit,
13 focused inappropriately on this. The tenants would
14 argue that any incremental worsening of the situation
15 is to the detriment of the tenants. We believe that
16 the records before the DHCR showed that the effect of
17 the Brooklyn-Queens Expressway are so massive that
18 the changes that we are proposing would be
19 insignificant compared to the volume of cars, 140,000
20 cars and trucks a day going by there. Today, we had
21 to shout inside to each other to be heard over the
22 sound of the trucks next door, I want to put this on
23 the record. And to suggest that, you know, that the
24 additional use would somehow worsen the situation, we
25 don't believe it's supported by the record.

1 THE COURT: Your argument, then, is the
2 tenants have been living with this situation of the
3 BQE right across from them for so many years that
4 they are immune to whatever --

5 MR. FISHER: I know it's imperceptible that
6 that embriem background noise is so loud that the
7 sound of a car door closing wouldn't be heard more
8 than a few feet away because of the background noise.
9 If we are trying to have a conversation on a subway
10 platform, every time a train goes by you can't hear
11 no matter how loud you are speaking.

12 THE COURT: These people live there, not in
13 an underground railroad. Isn't it then of more
14 concern that there shouldn't have to be a deprivation
15 of the quiet and enjoyment of life that some of us
16 take for granted?

17 MR. FISHER: Your Honor, but that's
18 exactly the point, there is no quiet and enjoyment.

19 THE COURT: Are we saying they have no
20 right, no expectation --

21 MR. FISHER: What we are saying --

22 THE COURT: -- and anything we do, it
23 doesn't matter because they have that BQE?

24 MR. FISHER: Absolutely not. What we are
25 saying, the evidence that we've submitted, which DHCR

1 said was not submitted at the right point,
2 procedurally, but which we think they could have
3 taken into account, the evidence we have submitted
4 shows that as a factual matter, the impact from the
5 operation of the garage in the courtyard would not
6 make it worse and the improvement would make it
7 better.

8 THE COURT: Are you saying that when you
9 park cars -- because it's a commercial -- it's going
10 to be a commercial garage, cars are going to be
11 parked because in this area, there is an acute
12 shortage of parking space, so you are going to have a
13 lot of cars being parked here?

14 MR. FISHER: Actually, the garage is for
15 approximately 100 cars, and offered for monthly
16 parkers.

17 THE COURT: You are going to have cars
18 lined up everyday, all day, and at night?

19 MR. FISHER: No, we don't believe so.

20 THE COURT: That's the nature of parking.

21 MR. FISHER: That's for daily parking not
22 monthly parking.

23 THE COURT: You are going to say to someone
24 who wants to go someplace at 12 o'clock at night that
25 you can't have the car?

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1 MR. FISHER: Of course not. But it's for
2 monthly parkers not necessarily -- In other words,
3 spots are not going to turn over multiple times in a
4 day with someone pulling in and out. It's not like a
5 public garage when people are coming to court and
6 come for a couple of hours then they leave, and
7 somebody else leaves, these would be for monthly
8 parkers.

9 We don't believe that the record justifies
10 any conclusion other than the fact that what the
11 tenants lost -- the question is not whether this is
12 in the abstract better or worse for the tenants, the
13 question before your Honor is whether the record
14 supports a determination that what the tenants lost
15 they are going to gain back. If the tenants are
16 getting back what they loss, then we are entitled to
17 have the plan approved.

18 THE COURT: But they are not getting back
19 what they lost because they never had a parking
20 garage.

21 MR. FISHER: But they always had that
22 public access easement that allows for vehicular
23 traffic in the courtyard.

24 THE COURT: I see two cars parked.

25 MR. FISHER: They had, I think -- I forgot

1 the exact number, but 85 percent of the courtyard was
2 green space previously, now most of -- the majority
3 of it is paved over, it's being returned to green
4 space. They were denied access; they are going to
5 get access. They were denied playground equipment;
6 they are going to get playground equipment.

7 THE COURT: I don't see how anyone would
8 let his or her child play in a courtyard where cars
9 are coming in to be parked and going out, to place
10 your child at risk, this is a dangerous situation.

11 MR. FISHER: We actually believe that when
12 you review the records, you will see that the design
13 of the space is such that the cars will enter and
14 exit through, and that is physically differentiated,
15 that would be surrounded by hedges. And the chance
16 of a young person or anybody else getting into the
17 path of the vehicles is actually minimal based on the
18 design that our landscape architect came up with.

19 THE COURT: How tall are the hedges?

20 MR. FISHER: The hedges are going to be --
21 I believe it's in the record, it's registered. The
22 hedges go up to the height of the cars so that when
23 you are standing where the fountain is now, if you
24 are standing there and you were looking to the left
25 of the BQE wall, you would be looking at the hedges.

1 In fact, this is in the record, there is a
2 registering, I don't know what exhibit number it is.
3 If you look at the larger board, you can see here,
4 this is standing at the entrance here on Joralemon
5 Street, looking down you can see that this area was
6 designed to create a physical barrier. So any child
7 that's under even loose supervision is -- certainly a
8 street-wise kid in New York, no one would go into
9 that area. That's roughly not -- as I've mentioned
10 before, the top of the cars are visible, that's what
11 it's going to look like. I can't guarantee all of
12 these people are going to use it, or that anybody is
13 going to go there now and --

14 THE COURT: I am not asking you to
15 guarantee anything. We can't guarantee one day from
16 the other, so we never ask you to guarantee. But
17 it's of concern to the Court --

18 MR. FISHER: Of course.

19 THE COURT: -- that the parking of cars
20 daily and nightly will place young children at risk
21 because, you know, you throw a ball, they are going
22 to run after the ball, that's the nature of children.
23 And the older people, I mean, to sit there and all
24 day and just see cars parking up and down.

25 MR. FISHER: Access to this area is going

1 to be controlled and valet parking. It's not going
2 to be that anybody can drive into the courtyard then
3 drive down to park in the garage, they are going to
4 come into the entrance area and the attendant is
5 going to deal with it. We provide for now queuing on
6 street level, it's all under ground.

7 THE COURT: They are going to queue up on
8 the street, and you are going to have someone to
9 direct the people coming in and out? If not, you are
10 going to have problems here.

11 MR. FISHER: Of course. It's attendant
12 parking. So, that's why we think the position should
13 be granted. Are there potential solutions to some of
14 these problems? That may very well be. We were
15 always willing to have that conversation. That
16 aspect of the record, I think, needs to be developed
17 further.

18 THE COURT: I am going to make a decision
19 one way or the other.

20 MR. FISHER: If your Honor believes that
21 the record is complete, we think the record supports
22 granting the petition.

23 THE COURT: I will hear from the other
24 side.

25 MR. DOBKIN: Tenants?

1 THE COURT: Yes.

2 MR. DOBKIN: Your Honor, I am Stephen
3 Dobkin, the attorney for the Tenants Association. I
4 think Mr. Fisher expects you to -- it's like the old
5 joke, who are you going to believe me or your own
6 eyes. Your Honor had the opportunity to see that
7 these are trees that can't be replaced by new
8 surroundings. The whole essential nature of the
9 background for all of the tenants that live in this
10 building, and children, and elderly tenants, revolves
11 about this massive trees, and the courtyard that was
12 there, and that was unfortunately taken away in 1992
13 by the former landlord. All the landlord has to do--
14 they have been complaining constantly that we don't
15 want to pay higher rent, but all they have to do to
16 get higher rent is to restore the courtyard. But our
17 argument is that the DHCR quite properly decided that
18 a restoration of this house in the courtyard with
19 those beautiful trees does not involve knocking all
20 -- every last one of those majestic trees down and
21 installing a 100-plus car parking lot right beneath
22 the surface of the courtyard. How could that
23 possibly constitute a restoration of what you just
24 saw, your Honor? It's just ridiculous. The DHCR's
25 decision was that this was not a proper restoration

1 or substitution, and that should be upheld. I think
2 it's very clear-cut. My concern when you came out
3 here, your Honor, was that the trees -- there are no
4 leaves on the trees right now, so you can't see --

5 THE COURT: It's March.

6 MR. DOBKIN: -- you can't see the entire
7 protective covering there. The photos, not the
8 record, that shows you what it looks like in the
9 summer.

10 THE COURT: I know what trees look like, I
11 have seen trees with leaves on them.

12 MR. DOBKIN: Yes. But looking at the
13 diagram that they are showing you, your Honor, you
14 could see the hedges are not even as high as half the
15 gentleman that's walking through a space. Plus, any
16 kids, any child playing in that courtyard could run
17 out, you know. I don't think it's reassuring to hear
18 that there are going to be parking lot attendants, at
19 least from the general experience that parking lot
20 attendants aren't necessarily the best drivers or the
21 most careful drivers in the world anyway. So, I just
22 suggest that that's going to -- to suggest that's
23 going to create a protective shield for the children
24 playing in the courtyard seems ridiculous. Let's say
25 if they want to do a restoration, a very simple way

1 is to take the asphalt up, put the grass down, put a
2 few more trees back in the beautiful courtyard, then
3 they --

4 THE COURT: That's not before the Court.
5 The rent aspect is not before the Court. The only
6 thing that's before the Court --

7 MR. DOBKIN: Is whether what they propose
8 would constitute proper rent, restoration of
9 services. We would say that it couldn't be clearer
10 than from your Honor's own observation of what we
11 have out there that their plan does not restore the
12 services that have existed there for many, many years
13 until they've decided to pave over this courtyard.

14 THE COURT: This is going to be a busy
15 courtyard with cars going in and out, whether you
16 have valet parking or not. So, once we do that, we
17 have taken the courtyard away from the tenants, they
18 can't use it, and no one is going to go out there to
19 sit in the summer time or any other time with cars
20 coming in and out. We are taking things away from
21 people.

22 MR. FISHER: The record isn't entirely
23 clear. Has anybody used the courtyard before it was
24 paved over? The record isn't clear.

25 THE COURT: No one uses it?

1 MR. DOBKIN: "Use." He said used it before
2 they paved it over.

3 MR. FISHER: The record is not entirely
4 clear as to how extensive the use was prior to 1991.
5 we know that when the buildings were built back in
6 the 1800's there was no BQE, there was wonderful --

7 THE COURT: There was no asphalt.

8 MR. FISHER: But after the BQE and the 30
9 foot wall was put up, and 140,000 cars and trucks a
10 day started going by. The background noise becomes
11 so loud that we ourselves had to shout to be heard
12 back there. With whatever pollution it is, we're not
13 entirely clear. I think the record includes
14 anecdotal information from a handful of tenants that
15 they may have continued to use it, but there is no
16 real evidence that anybody used the courtyard between
17 the time that the BQE went up and 1991, and there is
18 no evidence that anybody stopped using the courtyard
19 -- as your Honor pointed out, there are only a couple
20 of cars in there. There is no evidence that anybody
21 stopped using the courtyard after the prior owner
22 paved it over. So, I think there is -- you know, the
23 record before you I am not sure goes quite as far as
24 counsel for the tenants would suggest.

25 MR. DOBKIN: The record supports the

1 finding that there was a required service that was
2 available to the tenants and utilized by the tenants.
3 Of course, if they hadn't taken, you know, the grass
4 out and put in asphalt and allowed cars to go in
5 there, of course people would use it. Why wouldn't
6 they?

7 MR. FISHER: Because it's next to the
8 Brooklyn-Queens Expressway.

9 MR. DOBKIN: You can't walk out on the BQE,
10 that's behind the raised wall.

11 MR. FISHER: Thirty feet high, and it's
12 noisy and polluted, and that's what the record shows.
13 Your Honor knows this area. There are other parks
14 that are along the edge of here. Quite frankly, the
15 ones that are closest to the highway get less use
16 than anything else. For example, Hillside Park, for
17 years nobody ever went there, they made it into a dog
18 run so that people who have dogs are highly motivated
19 to go there; but before, it was a perfectly nice
20 grassy hill area, and nobody went there because this
21 was next to a highway, that's not where you go to
22 recreate.

23 THE COURT: Go ahead.

24 MS. DOTI: Maria Doti, for New York State
25 Division of Housing and Community Renewal.

1 Thank you, your Honor, for taking the time
2 to come here and view the site. We respectfully want
3 to remind the Court, and the parties, that -- of
4 Article 78, that is a very limited type of review,
5 whether or not DHCR had sufficient evidence before us
6 to make the decision. I respectfully request that
7 the Judge review our answering affirmation which
8 summarizes the entire record before DHCR, memorandum
9 of law, and also our supplemental reply which
10 explains more about our procedures. In this
11 particular situation, DHCR had before it the
12 evidence, that scientific evidence that the larger
13 the size of trees, the more space it takes versus
14 pollution. We've also had an expert witness
15 explaining about the type of egress, entrance into
16 the courtyard, and the different types of traffic,
17 and the patterns, and it would be just a disruption
18 of the rights of the tenants.

19 Remember, the posture of this case is that
20 the landlord, in 1991, removed a great portion of the
21 courtyard, so there was a rent reduction order in
22 place which was never appealed in Article 78 on any
23 other matter until this particular application. The
24 particular application that the landlord chose to put
25 in was a modification of the services but he did not

1 ask for rent reduction. So, in other words, our
2 analysis, as you will see in our papers, explains
3 that we had to see did he restore the courtyard in
4 the first place, and was he substituting giving an
5 adequate substitute of service. He was not, based on
6 scientific evidence before us, which was not refuted
7 at any point, even if you look at his evidence, if it
8 was timely submitted, which it wasn't, if you
9 consider it, it doesn't address the issues that were
10 raised by the expert witnesses for the tenants.

11 Now, there is another type of procedure
12 which we've explained where they could get a rent
13 reduction for either decrease or modification of
14 service which does have impact, that was not before
15 DHCR, and that would have to entail a new
16 application, which we are willing to look at, but at
17 this point we can't discuss how we would rule on it.
18 We are willing to -- open to settlement discussion at
19 the agency if the parties, tenant-landlord, would
20 like to come before us. We would like to cooperate
21 with the Court in any way possible.

22 Thank you, your Honor.

23 MR. FISHER: Can I address one thing?

24 THE COURT: Sure.

25 MR. FISHER: The parties disagree on a lot

1 of factual issues. The parties don't even agree on
2 what the record contains. But one of the legal
3 issues where we and DHCR see the law differently is
4 that we believe that they did have the authority
5 under the proceeding, the application we filed, to
6 adjust the rents further if they felt that this was
7 not a complete restoration. In other words, the
8 DHCR's position is that procedurally we could have
9 asked for something on a different modification but
10 we basically -- what we filed was all or not, it was
11 complete restore or it's not, therefore either a yes
12 or no situation. We believe that as a matter of law,
13 and we've briefed this issue, that they could have
14 treated our restoration application as giving them
15 the power to do a further modification, and we
16 believe that, and so what we've said, that part of
17 their arbitrariness, if you will, it's a legal issue
18 as to whether or not they had power. What Ms. Doti
19 is suggesting is that we need to file a different
20 proceeding, we've filed under the wrong proceeding,
21 and that if we filed under a different proceeding,
22 that would allow them to say that rent should go up
23 or down further. We think they have the ability to
24 do that within the context of this proceeding, that
25 would be one of the issues for your Honor to decide.

1 MS. DOTI: May I just say -- Maria Doti,
2 DHCR. In other words, to reduce the rent, if it
3 wasn't clear that he was asking us further to
4 consider further rent reduction, he would be arguing
5 we could accomplish arguing sua sponte and decide to
6 the lower rent on our own. Also, I address that
7 issue in my reply explaining that we felt even if we
8 considered, your Honor, the alternative, we still
9 would have denied that, we explained that. And at
10 this point, we stand on the record, your Honor, and
11 we would ask you to read the papers.

12 THE COURT: All right.

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14 The preceding transcript is certified to be a
15 true and correct record of the proceedings in this matter
16 to the best of my skills and abilities.

17 _____
18 Jacqueline Miles
19 Senior Court Reporter
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